Compact Video Services, Inc. *and* International Alliance of Theatrical Stage Employees. Case 31–CA–20104

September 29, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

On January 17, 1995, Administrative Law Judge Timothy D. Nelson issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and Charging Party both filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Compact Video Services, Inc., Burbank, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] We agree that the judge correctly rejected the Respondent's defense that it was not obligated to provide the Union with preimplementation notice of the sale of its business and a meaningful opportunity to bargain over the effects of the sale. We find, like the judge, that the Respondent has not met its burden of demonstrating ''particularly unusual or emergency circumstances'' that would relieve it of the obligation to provide the Union with effective notice. See *Willamette Tug & Barge Co.*, 300 NLRB 282, 283 (1990). Thus, we find it unnecessary to rely on the judge's speculative comments concerning actions the parties to the sale might have taken to accommodate the Union's legitimate interest in preimplementation notice and bargaining.

We also find it unnecessary to pass on the judge's conclusions with respect to the date on which the duty to provide notice and an opportunity to bargain attached. Suffice it to say that the Respondent gave no advance notice of the sale at all. *Los Angeles Soap Co.*, 300 NLRB 289 fn. 1 (1990).

Ann L. Weinman, Esq., for the General Counsel.
Richard W. Kopenhefer, Raymond W. Thomas, and *Richard S. Zuniga, Esqs. (Loeb & Loeb)*, of Los Angeles, California, for the Respondent, Compact Video Services, Inc.
Ira L. Gottlieb, Esq. (Taylor, Roth, Bush & Geffner), of Burbank, California, for the Charging Party, International Alliance of Theatrical Stage Employees.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. This is an unfair labor practice prosecution brought in the name of the Board's General Counsel by the Regional Director for Region 31, through a formal complaint he issued on October 1, 1993,[1] against the Respondent, Compact Video Services, Inc., after investigating a charge filed on August 30 by International Alliance of Theatrical Stage Employees (the Union). The prosecution has its origins in the dismissal of the Respondent's union-represented employees on August 5, as part of a sale of the Respondent's parent corporation, CVG, to an interim takeover entity called ATS, itself formed by an investment firm, Steinhart.[2] I heard the case in Los Angeles, California, in two trial stages, the first on December 9 and 10, and the second on July 25 and 26, 1994.[3]

[1] All dates below are in 1993 unless I say otherwise.

[2] Some clarifying and distancing remarks about the ''sale to ATS'' deserve immediate mention: As I note below, two of the Respondent's witnesses, Walston and Sabin, testified, in substance, that the ''ATS'' entity disappeared under uncertain circumstances and timing, and was replaced by a corporate entity called ''Four Media Company.'' Nevertheless, for simplicity's sake, and to be consistent with the parties' usage, I will use ''ATS'' throughout this decision to refer to the buyer/takeover entity. Also in the interest of simplicity, I will refer to the Respondent and CVG mostly in the past tense, even though Walston testified, in substance, that CVG and its subsidiaries survived the sale and takeover, and emerged with ''limited partnership interests'' in the Steinhart-controlled partnership that now holds all the stock in Four Media Company. Moreover, I take notice that in *ATS Acquisition Corp.*, Case 31–CA–20235, a separate prosecution currently being tried before Administrative Law Judge David G. Heilbrun, ATS is charged with having violated certain labor relations obligations it allegedly owed to the Union as a successor to the Respondent here. Finally, although the parties have litigated and submitted this case to me as if a genuine, arm's-length sale to a ''new'' employer occurred, the Union has noted as follows in its brief (p. 10, fn. 3):

> Throughout this brief, the Union uses the term ''sale'' in referring to the transaction advisedly, and without prejudice to its position that it may be a sham transaction, a claim being pursued in another case.

I, too, have approached this case as if an arm's-length sale between strangers were involved, but I do not purport to decide whether that was the case; nor do I intend in this decision to adjudicate any claims other than those made in the complaint in this case.

[3] The proceedings were interrupted by a subpoena compliance dispute. These are the details: Before the trial began, the General Counsel issued certain subpoenas duces tecum to agents of the Respondent and agents of ATS, calling for production at trial (for the General Counsel's inspection only) of, inter alia, records comprising the CVG-ATS sale agreement. The Respondent and ATS thereafter sought revocation of the subpoenas insofar as they sought such sale-agreement records (most often referred to in trial colloquy as the ''transaction documents''). In trial on December 10, with the production-revocation dispute by then having been narrowed to the documents making up the sale agreement, I granted the petition to revoke only insofar as the outstanding subpoenas sought portions of the sale agreement that revealed the salaries under the new ATS structure of corporate officers, managers, and other ''nonbargaining unit'' persons; but I denied the petition to revoke as to all other papers comprising the sale agreement. Later on December 10, after the General Counsel's and the Respondent's principal witnesses had concluded their testimony, and with the subpoenaed parties' compli-

Continued

The complaint alleges in material substance that the Respondent violated Section 8(a)(5) and (1) of the Act[4] by (a) failing ''[s]ince . . . July 22, 1993 . . . to give the Union timely notice of its decision to sell or transfer its assets, and . . . by failing and refusing to bargain with the Union about the effects of its sale or transfer of assets on the Unit employees,'' and (b) failing and refusing ''[s]ince . . . July 29, 1993 . . . to furnish the Union with [certain] information,'' to wit: the ''name and telephone number of the acquiring entity, including all officers,'' and ''[a]ll contracts relating to the acquisition.'' The General Counsel specifically seeks a *Transmarine*[5] remedy for the Respondent's alleged failure to conduct timely ''effects'' bargaining with the Union; a remedy that would require, inter alia, that the Respondent give at least 2 weeks' backpay to each of its terminated bargaining unit employees.

In its answer, as amended at the trial, the Respondent admits, and I find, that the Union is a ''labor organization'' within the meaning of Section 2(5) of the Act, that the Respondent is ''an employer engaged in . . . and . . . affecting commerce within the meaning of Section 2(6) and (7) of the Act,'' and that the Board's jurisdiction is properly invoked by the complaint.[6] The Respondent's answer denies all alleged wrongdoing, however, and avers various affirmative defenses, most of which are rooted in a common claim that its behavior was legally privileged by the ''exigencies'' of the moment. Alternatively, the Respondent maintains that a *Transmarine* remedy is not warranted even if its behavior violated the Act.

I have studied the whole record,[7] including the parties' posttrial briefs,[8] and the authorities they rely on. Based on that study and other research, and on the findings and analyses set forth below, I have concluded that the Respondent committed unfair labor practices substantially as alleged in the complaint, and that a bargaining order with *Transmarine* features, joined to an order requiring disclosure of the documents comprising the sale agreement, is the remedy package best suited to restore as nearly as possible the status quo ante.

FINDINGS OF FACT[9]

I. CENTRAL FACTS IN SUMMARY

In New York City, no later than August 4, an insurance company (Equitable) and a bank (Security Pacific)—the parties in effective control of the destiny of the Respondent's parent corporation, CVG—worked out the final terms of and signed an agreement with the Steinhart firm[10] pursuant to which Steinhart's acquisition corporation, ATS, would immediately buy CVG's assets and take over CVG's subsidiary operations, including the Respondent's postproduction operations in Burbank, California.[11] For purposes of this case, at least, the sale was ''implemented'' on August 5, when the Respondent discontinued operations in its own name and terminated all its employees, and ATS simultaneously took over the former CVG operations.[12]

---

ance intentions in doubt, I continued further proceedings to December 28. On December 21, the General Counsel moved to postpone further proceedings indefinitely, averring that the Respondent was refusing to turn over the transaction documents, and that the General Counsel intended to begin subpoena enforcement proceedings. I granted this motion on December 22, further directing that this trial would resume ''at such time as I may order hereafter, upon the submission by the General Counsel or any other party of a motion requesting the scheduling of resumed proceedings.'' The General Counsel initiated subpoena enforcement proceedings on or about January 31, 1994, before Judge Ronald S. Lew, of the United States District Court for the Central District of California. On March 15, 1994, Judge Lew issued an *order requiring obedience to subpoenas duces tecum*. On May 31, 1994, the General Counsel advised me of this in a motion to resume hearing, noting that the parties were mutually available on various individual dates in July 1994, and for the entire week of July 25. On June 3, 1994, I granted the General Counsel's motion and ordered the trial to resume on July 25, 1994. On that latter date, the Respondent made available for the General Counsel's inspection only, four bound volumes of ''transaction documents'' (containing roughly 2000 pages in total), plus another four cartons full of incidental paperwork. This disclosure mooted all outstanding subpoena disputes.

[4] Sec. 8(a)(5) makes it unlawful for an employer ''to refuse to bargain collectively with the representatives of his employees . . . .'' Sec. 8(a)(1) outlaws employer actions and statements that ''interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 . . . .'' Sec. 7 declares pertinently that ''[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]''

[5] *Transmarine Navigation Corp*., 170 NLRB 389, 390 (1968).

[6] More particularly, the Respondent admits, and I find, as follows: The Union's charge was filed on August 30 and served on the Respondent on or about August 31. The Respondent is a California corporation. Until on or about August 5, the Respondent maintained an office and principal place of business in Burbank, California. In annual periods before August 5, the Respondent bought and received more than $50,000 worth of goods or services from California sellers or suppliers who, in turn, received such goods in substantially the same form directly from outside California. I note further that the Board asserted jurisdiction over the Respondent in a 1987 unit clarification proceeding initiated by the Respondent's petition. *Compact Video Services*, 284 NLRB 117 (1987).

[7] Certain errors in the transcript have been noted and corrected.

[8] All parties filed helpful briefs on or before October 17, 1994, the extended deadline.

[9] The facts I find below are not materially disputed. Nevertheless, in most cases below, I will note the sources for my findings, especially where they involve interpretations or characterizations of the testimony and exhibits.

[10] ''Steinhart'' is the spelling used in the transcript whenever the firm or one of its affiliates was referred to by a witness or attorney, and the same spelling is adopted in all the parties' briefs. I note, however, that G.C. Exh. 11, the only exhibit of record mentioning the firm, uses the spelling, ''Steinhardt.''

[11] There is uncertainty (arising from Walston's testimony, infra) as to whether it was August 3 or 4 when the New York parties actually signed the sale agreement documents. Because the precise timing is irrelevant, I will assume that it was not until August 4 that the parties had finally signed all the papers comprising the sale agreement.

[12] The parties stipulated (Tr. 481:9–21) that, ''with regard to implementation . . . the transaction documents do not provide for anything other than immediate implementation of its [the sale agreement's] terms, as of the date that it was executed, on August 4, 1993.'' Despite this, I use ''implemented'' here in the same sense that the Board used it in *Willamette Tug & Barge Co*., 300 NLRB 282 (1990), that is, I intend to ''refer to the actual physical consequences of the sales [sic] decision, i.e., the termination of the enterprise and the employees.'' Id. at fn. 3. And it is for this reason that I refer to August 5 as the date of ''implementation'' of the sale.

The Respondent's employees thus terminated (nearly all of whom were rehired by ATS), included at least 100 who were working within a unit covered by a labor agreement between the Respondent and the Union that was not due to expire until July 1996. The Union was kept in the dark while negotiations for the sale were pending. Nevertheless, the Union got wind of the intended sale on July 27, the day after help wanted ads commissioned by ATS started running in two entertainment industry journals. The Union's agent began the same day to try to get further information about the intended sale from the Respondent's agents. On July 29, having learned no more from the Respondent than what had been in the help wanted ads, the Union delivered to the Respondent a letter containing a demand for information (including for ''all contracts, requests for proposals, and correspondence relating to the [then-pending] acquisition'') and a further demand for ''effects bargaining.'' The Respondent ignored these demands until after the sale and takeover were faits accomplis.

II. DETAILS

A. *The Respondent's Relationship to CVG; CVG's Operations, its Owners and Principal Secured Creditors*

The Respondent was one of three active operating subsidiaries of Compact Video Group, Inc. (CVG), a Delaware corporation. CVG's other two active subsidiaries were Meridian Studios, Inc. and Image Transform, Inc. These subsidiaries were arranged and operated by CVG so as to provide ''a vertically integrated post-production facility which services the TV and movie industry[,] all the way from developing film, negative, through the telecine process, which was the film-to-tape transfer, into editing, and performing the sound mixing, and distribution—the status, conversion, distribution, and then all the way through to where we could do the distribution by a satellite o[f] product.''[13] The Respondent's precise function or functions within this vertically integrated setup is not certain, but it appears that its employees worked on the final editing and sound mixing and sound effects for videotapes and films submitted by television and motion picture producers, and also operated the ''antenna farm'' through which CVG provided satellite uplink and cable television transmission services for many of the same customers for whom it provided postproduction services, including The Disney channel, one of CVG's mainstay clients.

CVG's and the Respondent's business offices are in Burbank, as are the technical facilities operated by the Respondent. At all material times, John H. Donlon was CVG's president and chief executive officer, and the chairman of its board of directors, and John Sabin was a vice president of CVG, and its chief financial officer.

CVG was formed in 1988, when, as Donlon testified, a predecessor holding corporation was ''taken private'' in a leveraged buyout (LBO). This LBO was financed by two main parties, Security Pacific Bank (Security Pacific), and The Equitable Life Assurance Society of the United States (Equitable). Security Pacific emerged from the LBO with a ''term'' loan to CVG, and a separate, ongoing line-of-credit arrangement with CVG. It also emerged as the holder of the senior lien on all of CVG's assets.[14] Equitable emerged as the ''majority shareholder [and] owne[r of] more than 80 percent of [CVG,]''[15] and as a subordinated lender with a junior lien on CVG's assets.

B. *Labor Relationship; Current Union Contract*

For at least a decade before the sale, the Respondent had continuously recognized and entered into successive labor agreements with the Union as the exclusive representative of a unit composed mainly of postproduction equipment operators and technicians.[16] In recent years, 100 to 120 employees have typically been employed in that unit.[17] In June through November 1992, Donlon and the Union's international representative, Leslie A. Blanchard, bargained for a successor labor agreement to cover these employees, and eventually, these parties reached a new contract,[18] which became retroactively effective to August 1, 1992, and was to run through July 31, 1996.[19]

[13] Sabin, at Tr. 470, and see Tr. 474:10–14, where Sabin makes clear that his descriptions referred to CVG's overall operations, and not just the Respondent's.

[14] At some point after the 1988 LBO and before the August 1993 sale to ATS, Security Pacific Bank was acquired by Bank of America, which apparently took over the former's ''term'' and ''revolving credit'' loan arrangements with CVG, and as well its status as senior secured lienholder. (It was with this in mind that Donlon and others occasionally referred to CVG's banker as ''Bank of America,'' or ''B. of A.'') For simplicity's sake, however, and without regard to the bank ownership realities at any given time, I will use the name ''Security Pacific'' to refer to CVG's banker. (Moreover, my preference for ''Security Pacific'' is influenced by the following: It appears from Walston and from two exhibits (R. Exh. 2; G.C. Exh. 11) that an entity called ''Security Pacific Business Credit, Inc.'' continued to supervise the lending relationship with CVG even after Bank of America acquired Security Pacific Bank, and that it was likewise this ''Security Pacific Business Credit, Inc.'' entity that was one of the players in the final negotiations in New York for the sale of CVG to ATS.)

[15] Donlon, at Tr. 238:18–20.

[16] The parties stipulated in trial on December 9 that a (rather lengthy and indefinite) unit description contained in par. 6 of the complaint ''constituted [the] bargaining unit covered by a series of collective bargaining agreements between Respondent and the Union since at least 1984, the most recent of which was effective by its terms from August 1, 1992, through July 31, 1996.''

[17] According to the Respondent's counsel in opening statement, there were ''106 bargaining unit employees'' working for the Respondent in the final week before the sale to ATS. According to the Union's Blanchard, the ''average'' unit complement was ''in the area of 100 to 120[.]''

[18] Although the Respondent assented to the 1992–1996 contract, Donlon implied that the contract failed to satisfy the Respondent's ''goals'' in the negotiations, which had been ''to get concessions, to cut company costs because we were facing a very difficult financial situation.''

[19] In finding that the Union—not one of its locals—was the recognized exclusive representative of the Respondent's unit employees, I have considered that the 1992–1996 agreement (Jt. Exh. 1) recites on its cover page that the ''Agreement'' is ''between'' a certain ''Local 695'' of the Union and the Respondent. I note, however, that the same agreement recites contrarily on its inside cover page that the ''Agreement'' runs ''between'' the Union itself (identified as ''International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States of America'') and the Respondent. Moreover, the Union—not Local 695—is identified as the signatory party. Finally, I note that the parties stipulated on December 9 (Tr. 9 and 11; emphasis added):

Continued

Article 35 of the 1992–1996 agreement, which is the terminal article, labeled, ''Application of Agreement'' states: ''This Agreement shall be binding upon the parties and their respective successors and assigns.'' Apart from this provision, which bears only indirectly on the issues in this case,[20] the 1992–1996 contract does not specifically address the parties' respective rights or obligations in the event of a shutdown or sale or transfer of the business. However, it contains provisions for ''severance pay,'' and although it nowhere defines what circumstances constitute a ''severance,'' it at least appears to contemplate ''layoff'' as a severance pay-triggering event.[21]

C. *Circumstances of the Sale*

Since at least January 31, CVG had been ''in breach of virtually every financial covenant included in the [Security Pacific] bank loan agreement,'' including ''the adjusted net worth covenant per section 7.10 of the loan agreement.''[22] Nevertheless, Security Pacific had elected through the first half of 1992 not to pursue its remedies.[23] In the first week of July, however, Security Pacific's New York financing representative invoked these ''events of default'' and called-in the term loan to CVG. This was a demand that Security Pacific knew that CVG could not satisfy, because CVG was by then ''insolvent.''[24] But as Donlon noted, it was a demand that effectively poised Security Pacific to put CVG into involuntary bankruptcy. Also in the first week of July, Security Pacific told CVG that, effective July 30, it would cancel its ''revolving credit'' (receivables financing) arrangement with CVG, an arrangement that had kept CVG's operations afloat until then, but whose July 30 cancellation would effectively require the Respondent to cease operating on that date.[25] (In fact, this didn't happen, because, as part of the ultimate deal, ATS funds were used to cover CVG's payroll and other operating expenses through August 4.)[26]

CVG's financial difficulties had been well known to Security Pacific and Equitable for at least 6 months before Security Pacific thus pulled the pin in early July. And CVG and Equitable—presumably Security Pacific, too— had been searching for a ''white knight'' to buy CVG's assets, pay off at least some of its debts, and keep its operations running. In late 1992, such a potential rescuer had appeared in the form of **Robert T. Walston**, who, on behalf of Steinhart Management Company, Inc., was looking for ways to invest funds held in certain individual ''Steinhart Partnerships.''[27] According to Walston, Steinhart's 1992 interest in buying CVG was grounded in a broader acquisition and merger plan, under which Steinhart investors would also buy the assets in bankruptcy of another postproduction company, AME, and then combine AME's and CVG's former operations.[28] With this broader plan in mind, as Walston testified, Steinhart had at some point in late 1992 submitted some kind of bid for CVG to Equitable, which Equitable had initially turned down. Apparently, however, this was, at most, only a temporary setback, for Walston and Donlon testified that further negotiations between Steinhart and Equitable and Security Pacific took place in the ''spring'' of 1993.

Indeed, by mid-June, Steinhart had gone so far as to submit a new ''letter of intent'' to Equitable regarding the purchase of CVG, and had sought and obtained from Security Pacific a set of financing commitments and concessions to ''facilitate'' such a sale. And although not all of the details of the tri-partite arrangement then in contemplation are of record, many of them can be inferred from a nine-page letter transmitted on June 16 by a Security Pacific officer in New York to Walston/Steinhart in New York which mentions a ''letter of intent . . . dated June 3, 1993 among [sic] Steinhardt [sic] and an affiliate of . . . Equitable[,]'' and in which Security Pacific (also called ''the Lender'' in the let-

---

the employees of the Respondent in the classifications described in paragraph 6 of the Complaint constituted a bargaining unit covered by a series of collective bargaining agreements between Respondent and *the Union* since at least 1984, the most recent of which was effective by its terms from August 1, 1992, through July 31, 1996.

[20] The complaint does not allege that the Respondent owed a duty to bind ATS to the Respondent's union contract, and the General Counsel makes no such claim.[*] The General Counsel, however, relies in part on the art. 35 ''assumption'' clause to argue that the sale transaction documents sought by the Union were ''relevant and necessary'' to the Union's effective performance of its representative function.

[*] Since August 5, the Union has been claiming in correspondence with the Respondent's attorneys that the Respondent owed at least a *contractual* duty to require ATS to ''assume and abide by'' the Respondent's 1992–1996 contract with the Union. (G.C. Exhs. 3(a), (d), (e), (h), and (m); R. Exh. 8.) And the Union has apparently filed a court action to compel arbitration of this claim. In addition, it appears that the Union claimed in its charge in this case that the Respondent owed a *statutory* duty to thus ''bind'' ATS to the 1992–1996 contract. (G.C. Exh. 3(m), p. 1, par. 1, penultimate sentence.) If such a statutory claim was part of the Union's charge, however, it was apparently dismissed, and therefore I do not propose to address any such claim.

[21] Art. 14 of this contract (Jt. Exh. 2, pp. 16–18) generally addresses ''Seniority, Layoffs, Severance, and Recalls;'' it contains two references to severance pay in its ''Layoff'' subsection, and more specifically defines the formulas for computing the amount of such pay in its ''Severance Pay'' subsection. Id. at p. 17-A.

[22] Sabin, at Tr. 411, 418.

[23] R. Exh. 2.

[24] Donlon, at Tr. 221:24–25.

[25] By mid-July, according to both Donlon and Sabin, CVG only had enough cash left to cover its payroll and taxes through the end of the month, plus a reserve to cover the costs of filing its own bankruptcy petition under Chapter 11. And according to Sabin, the only reason CVG had even this much cash available is that Sabin had ''siphoned-off'' a recent pair of checks (totaling $113,000) from The Disney channel and TVN, another main customer, and instead of sending them to Security Pacific under their ''lock box account'' arrangement, had ''stashed'' these checks in his office safe.

[26] Donlon, at Tr. 288–294 (referring to an ''infusion'' on either August 4 or 5 of about $1 million, and a ''commingling'' of that money with CVG money to cover the final CVG payroll). Cf. Walston, at Tr. 403–406 (referring to a ''loan'' from ATS to CVG for such purposes, made as soon as the deal ''closed''). Cf. Sabin, at 454–456 (referring to checks for CVG operations and payroll issued on August 4 from CVG account containing insufficient funds to cover such checks, but issued ''on the come,'' based on anticipated infusion of ATS funds the same day or the next).

[27] Several different names for various ''Steinhart'' entities appear in this record. ''Steinhart Management Company, Inc.'' however, is the name of the entity that Walston, after reflection, decided that he had been working for during the sale negotiations.

[28] Walston testified, ''We [Steinhart] felt that the strengths of the two entities together would give us a considerable amount of market share that would make both enterprises much stronger on a united basis.''

ter) responded to Steinhart's ''request'' for ''financing . . . in connection with the acquisition . . . of substantially all of the assets . . . and the assumption of specified liabilities [including certain indebtedness to the Lender] of Compact [meaning CVG] and its subsidiaries.''[29]

Essentially, that letter described what Security Pacific was prepared to do by way of future financing in the event of such an acquisition, and the ''financial accommodations'' it was prepared to make to ''facilitate'' that acquisition. And in the course of doing so it further outlined the ''structure'' and various other terms for the sale of CVG then in contemplation, the ''Anticipated Closing Date'' of which was to be ''June 30, 1993.'' Thus, as to the ''Transaction Structure,'' Security Pacific's letter noted that, ''[a]s currently contemplated . . . the Acquisition will be made by a limited partnership (the Partnership) . . . formed by [Steinhart] and [CVG][,]'' into which CVG would ''contribute'' its ''Assets and certain liabilities . . . in return for a 99% limited partnership interest in the Partnership[,]'' and that ''[o]n the Partnership Formation Date [Steinhart], through a newly-formed entity (The General Partner), will acquire for cash a 1% general partnership interest in the Partnership.''[30] Moreover, Security Pacific proposed to ''facilitate the acquisition'' by providing the acquiring entity with up to $10.55 million in new credit lines, and by agreeing that, ''at closing,'' it would ''cancel'' and ''forgive'' $4 million of CVG's ''indebtedness to Lender.''[31] And Security Pacific further ''acknowledged'' that Steinhart's ''willingness to consummate the Acquisition [was] subject to . . . conditions,'' which included, inter alia, ''[r]eceipt of all required regulatory approvals, including without limitation, those required from the FTC and the FCC.'' Also of interest is Security Pacific's assurance that Steinhart's acquisition of AME was ''not a precondition to [Security Pacific's] entering into the financial transactions contemplated herein.''

On July 16, Steinhart's plan to acquire AME was crushed when Steinhart was outbid at the bankruptcy auction of AME's assets. According to Walston, this development caused Steinhart's interest in buying CVG to falter, and that ''about a week or so'' was then consumed as Walston and his Steinhart associates tried to decide whether to go forward with a purchase of CVG on a ''stand-alone'' basis, and if so, at what price.[32] In this regard, although Walston is no more specific as to the timing and duration of these post-July 16, in-house deliberations by Steinhart, I infer that Steinhart had decided to pursue such a stand-alone purchase of CVG by no later than July 22; for it was on July 22 that Donlon, acting on Walston's instructions, made arrangements for ''new . . . video services company'' help wanted ads to be placed in two Los Angeles trade journals, as I further describe, infra.

Thus, apparently not later than July 22, and perhaps before then, Steinhart, with Walston in charge, began final, intensive negotiations in New York City with Equitable's and Security Pacific's representatives, and their attorneys and accountants. (It is clear from Walston, Donlon, and Sabin that CVG's officers or representatives played no role other than as distant onlookers in these final negotiations, and that they had long since ceded to Equitable, as the majority owner of CVG, the responsibility for and the right to make whatever deal might be made on CVG's behalf.)[33] According to Walston, in the final days before the deal was concluded, these negotiations foundered and nearly broke off several times, over the interrelated issues of ''price'' (or ''valuation'') and debt allocation, including how to allocate leasehold obligations.[34] Walston suggests that these issues were of critical importance to Equitable, because Equitable would—and did— retain an ''equity interest'' in the buyer/takeover entity, and was therefore concerned that its interest after the sale not be ''diluted'' beyond a certain limit,[35] and this, in turn required a lot of analyzing by lawyers and accountants of the ''dilutive'' or ''anti-dilutive'' impact on Equitable's

[29] In this paragraph and the following one, I quote from G.C. Exh. 11.

[30] Although we cannot be certain that every detail of this ''contemplated structuring'' was observed when the CVG-ATS sale eventually occurred, it appears from Walston's descriptions, infra, that the deal eventually reached was structured so as to give CVG a ''limited partnership interest'' in a ''Partnership'' whose ''general partner'' would be a Steinhart-controlled entity.

[31] Security Pacific also offered additional financial accommodations (phrased as ''acknowledg[ments'' of Steinhart's own conditions), including such as these: Continued ''funding to [CVG] . . . through the Closing under the . . . existing revolving credit facility with CVG''; and ''deferring . . . through the Closing or July 15 1993 (whichever is earlier)'' certain ''principal'' and ''interest'' payments due under CVG's ''indebtedness'' to Security Pacific''; and providing a ''Borrowing Base'' to the acquiring party of ''at least $3,000,000 on the date of the Closing.''

[32] Walston testified:

> So when the AME transaction went away . . . [w]e had to make a tough decision: Are we interested in Compact on a stand-alone basis or not? And I guess it took us about a week or so to say, maybe we're interested, but certainly not at the price that we were [prior to July 16] going to pay for—attribute to Compact's assets. We can't—we can't justify that kind of value for the company.

[33] Indeed, asked, ''[W]ho was running the [final, New York] negotiations?'' Donlon replied, ''Equitable, from the company [CVG] side.'' (Tr. 237:9–12.)

[34] Walston testified that the ''major [issue] was price.'' Later, he elaborated that ''[t]here were major disagreements up until the final hour about the nature of Compact's unsecured debt, and how that would be handled, who would be accountable for that. Also major disagreements about leases, real estate leases, and who would remain obligated to continue to pay those leases.'' And he summarized by saying, ''And so it was just a negotiation up until the day of closing on a range of issues, all relating to value.''

[35] The exact nature of Equitable's postsale ''interest'' in the entity that acquired CVG—indeed, the entire postsale structure of ownership-is not easy to pin down from Walston's somewhat vague descriptions (at Tr. 373–374) of these features of the August 5 deal. Thus, Donlon first referred to Equitable's ''equity interest'' in the takeover corporation, but later explained that Equitable's interest was more in the nature of a ''security interest in [CVG's] only remaining asset, which is their [CVG's] limited partnership interest in Technical Services Partners,'' the ''only asset of [which] is the stock of Four Media Company.'' His explanations suggest, in the aggregate, that Equitable, as the majority stockholder of CVG, retained some uncertain share of CVG's own postsale interest in ''Technical Services Partners,'' which now owns the ''Four Media'' corporate entity that now operates the former CVG businesses. (Indeed, there are yet more structural layers in the postsale arrangement. Thus, Walston explained that ''Technical Services Partners'' is itself ''controlled by a 'corporate general partner' called Technical Service Holdings, Inc.[,]'' and that the ''corporate general partner'' is, in turn, ''controlled by the general partners at Steinhart.'')

postsale interest of any given valuation or debt allocation arrangement or other structuring of the deal.[36]

Walston's testified, moreover, that both Equitable and Security Pacific had to be persuaded to accept major losses on their previous investments in CVG—in Equitable's case, to write off $50 million; in Security Pacific's case, to swallow $4 million of CVG's indebtedness.[37] While I accept Walston's testimony insofar as it suggests he had to work hard in the final negotiations to get Equitable to accept a $50 million loss, I doubt him when he further suggests that Security Pacific was resisting until the end absorbing $4 million in debt owed by CVG. For as early as June 16, Security Pacific had confirmed to Walston/Steinhart in writing its willingness to ''cancel'' and ''forgive'' that amount of CVG's indebtedness, in order to ''facilitate'' the sale of CVG. And for reasons tracing to the same source, I give no weight to Walston's additional assertion that, after Steinhart lost its bid for AME, this caused Security Pacific to rethink from scratch its own interest in helping to finance a purchase of CVG alone.[38] In sum, I accept only so much of Walston's testimony about the final negotiations as suggests that the ''price'' to Equitable—itself understood in terms of Equitable's concern about structuring the sale so as to minimize ''dilution'' of its postsale interest in the acquiring entity—was the principal issue to be resolved before the deal could be concluded.[39]

In any case, as Walston testified, both Equitable and Security Pacific became persuaded that Steinhart's terms were easier to accept than the alternatives, the bankruptcy of CVG and the lingering liabilities associated with CVG. And once the final terms were worked out, the parties were apparently able to assemble and sign the same day (either on August 3 or August 4)[40] an ''agreement'' package comprised of roughly 2000 pages of terms and conditions and schedules and appendices.[41] And thus it was that on August 5, simultaneous with the Respondent's dismissal of its employees, ATS began to run CVG's former operations, including the Respondent's,[42] using many of the Respondent's former employees.[43]

---

[36] Walston emphasized that the ''price'' of the sale had to be considered in terms of ''Equitable's ongoing ownership interest, how that interest would be structured.'' And he further elaborated, ''We knew that subsequent to the acquisition we would have to put additional capital into the company. And what would happen if we put in additional capital? How would that dilute Equitable's equity interest? What happens if we were able to receive a distribution from the company? How would that be anti-dilutive to Equitable's equity position?''

[37] See generally Tr. 374–381.

[38] Walston testified in this regard that Security Pacific ''anticipated . . . that when we bought AME, we would pay all cash for it. So they anticipated having a lot of additional collateral added to their security interest free and clear. So when the Compact-AME combination never occurred, they, then, probably thought . . . . Do we want to liquidate this thing and try to get our money out of it, or do we want to try to work out a deal on a stand-alone basis?'' Walston was clearly speculating, at the least, when he spoke of Security Pacific's interest in Steinhart's successful acquisition of AME's bankruptcy assets, and of Security Pacific's ''probabl[e]'' in-house reaction to Steinhart's losing its bid for AME's assets on July 16. Indeed, I think he was not being truthful here, for his speculations are wholly at odds with Security Pacific's June 16 letter to Walston himself, in which the former acknowledged that Steinhart's intended acquisition of AME was ''not a pre-condition to [Security Pacific's] entering into the financial transactions contemplated herein[,]'' which transactions contemplated, inter alia, that Security Pacific would swallow $4 million of CVG indebtedness, and would otherwise make financial accommodations to facilitate the sale.

[39] I have in mind particularly, these portions of Walston's testimony:

> And that was part of the problem in the negotiation. Because it [Equitable] was an entity looking square in the face of losing their entire $50 million investment, which is, you know, conceptually what happened—and wanting more, wanting something; wanting, you know, up until the final hour before a bankruptcy filing, trying to get something out of us. And, you know, I have sympathy for Equitable. No one likes to lose $50 million. But we couldn't put ourselves in the position of having it happen to us. Because we're going in a new venture, a new company, a new—a new direction. And nothing that Compact Video did, or was, had any relevance to our new situation.
>
> JUDGE NELSON: And presumably, The Equitable finally decided that it would get less by a cash sale of the assets, as encumbered as they were?
>
> THE WITNESS: Right. And, in fact—
>
> JUDGE NELSON Than if they went along with your proposal?
>
> THE WITNESS: And, in fact, Security Pacific believed that it would have gotten less than the face value of its debt. So there would have been nothing left for Equitable. And Equitable might have had to be around for years, in the process of a bankruptcy, and deal with future liability, that—you know, who knows what Equitable would have—
>
> JUDGE NELSON: So they got off clean from a liability standpoint?
>
> THE WITNESS: Yeah.

[40] The Respondent acknowledges (Br. 34) that the ''sales contract with ATS was not executed until August 3rd or 4th.'' The indefiniteness traces from Walston's testimony, where he suggests that the parties had ''signed'' at least some sale agreement papers on August 3 (and perhaps all of them), but that on August 4, somebody discovered an issue in the wording of something that had previously escaped the lawyers' attention, which triggered further discussions of valuation issues that were not resolved until August 4.

[41] The Respondent (Br. 34) describes the sale agreement as a ''huge and complex document.'' From my personal observation of what was presented by the Respondent for the General Counsel's inspection at the July 25 trial session (see fn. [ ]), the Respondent's description is an understatement. Of the roughly 2000 pages comprising the ultimate ''transaction document,'' however, only two-fragments, totaling 7 pages, found their way into this record. The first is Jt. Exh. 3, a five-page excerpt from the sale agreement dealing with ''assets'' and ''liabilities'' of CVG that were to be ''excluded'' from the sale and not to be ''assumed'' by ATS (which appears to be the entity actually called ''Newco'' in this excerpt, which also refers to an entity called the Partnership.) And in this excerpt, ''any and all rights of [CVG] under the Union contract'' were defined as ''Excluded Assets,'' and ''any obligation or liability relating to the Union contract or to any grievances . . . or other claims relating thereto'' were defined as ''Excluded Liabilities.'' The other fragment received into evidence in this case is Jt. Exh. 4, a two-page schedule included in the sale agreement which sets forth the pay rates—both before and after the sale— of certain named former bargaining unit employees of the Respondent who were hired by ATS. It shows that most of them received lower hourly pay rates after they were rehired by ATS. (Indeed, because the parties stipulated that the pay rates shown for the employees when they worked for the Respondent fails to include contractual pay raises they had recently received, we may infer that all of the employees on the list received lower hourly pay after they were rehired by ATS.)

[42] R. Br. 9.

[43] There appears to be no dispute that nearly all of the Respondent's former employees were rehired by ATS. (Donlon, at Tr. 226;

III. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent (indeed, CVG itself) admittedly tried to (and largely did) keep the existence of these pending sale negotiations a ''secret'' from the Union and the bargaining unit employees.[44] But the Respondent claims, in substance, that this was done not specifically to frustrate the Union's and the employees' interest in having a say about how this sale would affect them, but rather to ensure that the Respondent's (or CVG's) customers and vendors would not learn of the impending sale until it was a done deal. Thus, both Donlon and Sabin testified, in substance, that total secrecy was deemed important to CVG's officers and owners because they feared that if word got out to CVG's already jittery customers and vendors that some kind of sale was in the works, both would be ''spooked,'' and the former might ''bolt'' and the latter might ''shut you off,'' especially if the deal were to collapse for some reason. And for this reason, ostensibly, the Respondent admittedly gave the Union no '''formal' notice'' before the sale that such a deal was being actively pursued.[45]

The secrecy enshrouding the deal, however, began to be compromised as early as Thursday, July 22, when CVG's agent Kleckner, upon Walston's direction by telephone from New York to Donlon, placed orders for help wanted advertisements with two entertainment industry journals, the Hollywood Reporter and Daily Variety.[46] These ads, which started to appear in these journals on Monday, July 26, stated in pertinent part:

> POSITIONS AVAILABLE
>
> New state of the art video services company now forming, pending acquisition of the assets of Compact Video Services, Inc. [and two other named CVG subsidiaries] on or about August 2nd 1993. We are accepting applications for all technical and support classifications.[47]

The Union's Blanchard learned of these ads on Tuesday, July 27, through a phone call from a member employed by the Respondent, who also faxed a copy of the want ad to Blanchard. Blanchard then placed the first in a series of calls to the Respondent's (actually, CVG's) business offices in Burbank. At about midday on July 27, Blanchard reached Human Resources Director Kristi Kleckner by phone, and ''asked her what was going on, what was with this ad?'' Kleckner replied:

> I don't know anything more than you do. I've seen the ad, but I don't know anything more than what's in the ad.

Over the next few days, Blanchard tried several times to reach Donlon by phone, but was regularly informed that Donlon was ''not in.'' (Donlon admitted that Kleckner had told him about Blanchard's first call; he also admitted that he was ''probably'' aware, too, that Blanchard had been trying to reach him directly during this period, and that he did not try to call Blanchard back. Considering the surrounding circumstances, I have little difficulty finding that Donlon was, in fact, aware of Blanchard's calls, and that his failure to return Blanchard's calls was quite intentional.)

On July 29, having thus far run into what he called a ''stone wall,'' Blanchard dispatched a letter to Donlon through three different media—registered mail, fax, and hand-delivery to Donlon's office. In pertinent part, this is what Blanchard's letter said:

> It has come to the attention of the I.A.T.S.E. that Compact Video assets are being acquired by an unknown entity. (See enclosed ad in the *Hollywood Reporter*, dated 7/26/93, p. 24.)
>
> Please state whether this acquisition is contemplated at this time or expected in the foreseeable future. If so, please provide the following information:
>
> 1. The name, address and telephone number of the acquiring entity, including all officers.
>
> 2. All contracts, requests for proposals, and correspondence relating to the acquisition.
>
> 3. Enumerate in detail all assets that may be subject to the acquisition.
>
> 4. State whether you expect Compact Video Services, Inc. employees' terms and conditions of employment and/or job security to be affected by this transaction.
>
> If your answer to No. 4 is anything other than an unqualified ''no,'' please describe all effects you expect the transaction to have on the employees' terms and conditions and on their job security.
>
> The IATSE hereby demands that Compact Video Services, Inc. bargain over any decision to sell or otherwise provide assets to any acquiring entity and over the

Blanchard, at Tr. 76; R. Br. 10.) What remains unclear, however, is whether these rehirees were all put to work immediately, or perhaps were rehired incrementally. Also unclear is whether ATS hired additional employees from ''outside'' to staff the Respondent's former operations.

[44] R. Br. 7.

[45] R. Br. 10. In this regard, although I won't dwell on the point, I retain more than a little doubt that CVG's precarious financial position was a ''secret'' to its customers and vendors. Thus, both Donlon and Sabin testified that CVG had been for many months ''stretching'' its major suppliers of critical video and film stock and processing equipment. And Sabin conceded that these vendors would ''know when they're being stretched.'' In addition, Donlon admitted that the Respondent's (or CVG's) contract with The Disney channel for final editing and satellite transmission included ''covenants'' requiring that the Respondent/CVG maintain a certain ''debt to equity'' ratio, and a certain level of ''financial performance,'' and that not only did The Disney channel ''have the right to audit as it saw fit to ascertain whether or not [the] ratios were being met[,]'' but ''as a matter of fact, they [Disney] did [conduct such audits].'' And Sabin further agreed that ''Disney was pretty much in the picture about where [CVG] stood financially by virtue of those rights.''

[46] Walston instructed Donlon to place these want ads on behalf of ATS; Donlon assigned the task to Kristi Kleckner, the Respondent's (and/or CVG's) human resources director. Donlon testified that although he ''objected'' to such a want ad as ''premature,'' he nevertheless acquiesced, because, ''when your white knight says to do something, you do it.''

[47] These ads did not identify the ''new . . . company now forming,'' nor did they give a name to the ''we'' who were ''accepting applications.'' Rather, the ads gave only a Burbank street address where ''candidates'' might ''apply,'' and a fax number through which they might transmit ''resume[s].''

effects of any such transactions on any IATSE bargaining unit employees.

Please call the undersigned in response to this letter by 5:00 p.m. on July 30, 1993.

Donlon did not call Blanchard back or otherwise respond to this July 29 letter.

On July 30, however, the Respondent's employees and those of other CVG subsidiaries received two letters announcing the intended sale—one from CVG, signed by Donlon; the other from ATS, signed by Walston.[48] In pertinent part, Donlon's letter said this:

Dear employee:

. . . we have reached an agreement in principle to sell the assets of . . . ''the Compact companies'' to ATS Acquisition Corp. . . . The Company cannot continue in its present form and must be sold. There is no option. . . . The sale is expected to close the week of August 2, 1993. After the sale closes, you will no longer be employed by the Compact companies. Many of you will receive employment offers from ATS Acquisition Corp. or its subsidiary companies. . . .

I encourage each of you to apply for employment, as I have, with ATS Acquisition Corp. ATS . . . is actively considering its staffing needs and will be sending out offers of employment shortly.

On behalf of the Compact companies, I want to express my thanks for your service.

Walston's letter made essentially similar announcements regarding the ''agreement in principle'' to buy CVG's assets as part of a sale that was ''expected to close the week of August 2, 1993.'' He likewise ''encouraged'' the employees to submit applications, and advised them that this must be done by ''no later than ***Monday August 2, 1993*** [Walston's emphasis], which is the application deadline.'' He further advised employees that ''[t]he ATS application form is available in [CVG's] Human Resources [office].'' And in the final two paragraphs of his letter, Walston said this:

I expect that ATS will be an exciting and rewarding place to work. We believe our compensation and benefits package will be competitive. We have worked on this transaction for many months and have come to understand that highly motivated employees supported by continued investment in the business will be critical to our success.

We have been advised that if a certain number of you are offered and accept employment, the union which represented you at the Compact companies may thereafter have the right to meet with ATS to discuss a new collective bargaining agreement. In that event, ATS will certainly satisfy all legal obligations with respect to union negotiations.

Also, on or shortly after August 2, many of the Respondent's employees received written offers of employment by ATS, together with a 39-page ''Employee Handbook''[49] describing their terms and conditions of employment with ATS. (Donlon, admittedly with the assistance of ''Loeb and Loeb''—the attorneys for both the Respondent and ATS—had been working up this handbook for ATS employees for more than a week before the deal closed and perhaps for as much as a month before the deal closed.)[50]

Blanchard soon learned of Donlon's and Walston's letters to employees, and on or about August 2, to ''reassure the membership,'' he visited the Respondent's main Burbank postproduction facility, which also housed CVG's office headquarters and Donlon's and Kleckner's offices. Cross-examined about this by the Respondent's counsel, Blanchard admitted that he talked with Kleckner, in her office, and ''asked her for information,'' but ''was told she didn't have any idea,'' neither ''as to the closing date, [n]or the total effects.'' Blanchard further acknowledged, albeit vaguely, that in later telephone contacts with Kleckner before August 5, he ''may have'' raised questions about ''severance pay'' and other questions about the impact on employees of the sale. (E.g., ''What happens to their medical benefits . . . their pension plan?'') With equal uncertainty, he acknowledged that Kleckner ''may have'' replied, as to severance pay, that the Respondent did not intend to give severance pay ''to employees who were accepting employment with ATS.'' So, too, he recalled that Kleckner ''may have'' replied, ''I don't know,'' to many questions. He further recalled, more specifically, that Kleckner told him at least once that he could ''grieve whatever [he] felt was grievable.''

IV. EPILOGUE

Because both the prosecuting parties and the Respondent have sought to support their respective claims and defenses by reference to events occurring after the August 5 sale, I record the following additional facts relevant to such claims and defenses:

Pursuant to negotiations with ATS that preceded the sale, Donlon became the president of ATS, and apparently continued to be in charge of the former CVG operations, now being operated under the name ''Four Media Company.'' Sabin, too, emerged from the sale in roughly the same position he had previously occupied with CVG; he became the senior vice president of ATS/Four Media and its chief financial officer. Steinhart's representative in the sale, Walston, however, became the board chairman and chief executive of ATS/Four Media.

I have noted that ATS is charged in a separate proceeding with having violated certain labor relations obligations it allegedly owed to the Union as a successor to the Respondent. On this record, it appears that ATS has declined thus far to

[48] Donlon testified that he distributed his own letter to employees on July 30 because he ''had a reasonable feeling that the transaction would close,'' a ''feeling'' that he implied was informed by his admitted contacts by telephone with Equitable's representatives in the New York negotiations. Given the fact that the distribution of this letter was coordinated with the same-day distribution of Walston's letter, however, I infer that Donlon's ''feeling'' that the deal would close was at least equally influenced by communications from Walston, the buyer's representative, who, indeed, must have instructed Donlon to distribute both letters simultaneously, much as he had earlier instructed Donlon to place the want ads in the *Hollywood Reporter* and in *Daily Variety*.

[49] This handbook, incorporating a specimen offer of employment, was received as G.C. Exh. 4.

[50] Donlon, at Tr. 252–254, esp. 254:3–6.

recognize the Union as the representative of a unit of employees limited to those doing work formerly performed in the Respondent's operation, but is contending instead that recognition could only be granted in a combined unit of employees of all of CVG's former operations.[51]

Although the Respondent has offered since at least September 1 to engage, post facto, in ''effects bargaining'' with the Union,[52] it refused then, and has continued to refuse the Union's additional demands since then, to see the sale transaction document(s) in their entirety.[53] On November 24, however, in the context of an arbitration of the Union's grievance seeking 2 weeks' severance pay for all of the Respondent's former bargaining unit employees, the Respondent disclosed to the Union a small number of transaction documents that the arbitrator had deemed relevant to that proceeding.[54] Moreover, since September 10, the Union has effectively declared its unwillingness to conduct effects bargaining unless or until the Respondent and ATS fulfill certain conditions, including the disclosure of the sale documents in their entirety.[55]

[51] In his opening statement, the Respondent's counsel, Richard Kopenhefer (who also represents ATS in the successorship case), averred, inter alia, that ''ATS . . . has now granted recognition to IATSE in the old Compact Video Services unit.'' But he immediately seemed to qualify (or even contradict) that representation when he added that ATS ''has in fact contended that a broader companywide unit comprised of other companies acquired as part of the same transaction is appropriate; hence the *Burns* successorship case pending against ATS.'' Tr. 30: 24–31: 7. Moreover, pertinent to Kopenhefer's averrals, I note that when he wrote (in his capacity as attorney for ATS) to the Union's attorney on August 17, Kopenhefer said as follows:

> In light of our conclusion regarding the appropriateness of a single company-wide bargaining unit, we have concluded that ATS is *not* a *Burns*-type successor under the National Labor Relations Act. We must therefore decline your request to recognize IATSE and bargain with it on the limited basis you propose. [G.C. Exh. 3(g), p. 2 (emphasis added)].

[52] R. Exh. 7, p. 1.

[53] G.C. Exh. 3(h), p. 2, last paragraph (August 17 union demand); G.C. Exh. 3(k) (August 25 reiteration of demand, citing reasons); R. Exh. 7, p. 2, item 4 (Respondent's September 1 reply, asserting ''no coherent basis for your [production of sale documents request[,]'' and therefore, ''we fail to see how we have any statutory duty to provide sales documents''; and R. Exh. 8, items 3 through 5 (Union's September 2 reiteration of demand for ''all documents related to the assets sale,'' again citing reasons). So far as this record shows, the Respondent did not thereafter reply in any fashion to the Union's demands for sale documents.

[54] Although it is uncertain on this record exactly how much of the sale agreement was shown to the Union at the direction of the arbitrator, the parties stipulated that the papers the Union saw on November 24 included Jt. Exhs. 3 and 4. (As I have mentioned earlier, these were: (1) a five-page extract from the sale agreement describing the ''assets'' and ''liabilities'' that CVG retained after the sale (essentially, all assets and liabilities and obligations under the ''Union contract,'' and liabilities to employees under CVG's ''Employee Benefit Plans''); and (2) a schedule attached to the agreement comparing pre- and post-sale pay rates of certain former bargaining unit employees of the Respondent who were rehired by ATS.

[55] R. Exh. 9, p. 1.

V. ANALYSIS; SUPPLEMENTAL FINDINGS; CONCLUSIONS OF LAW

A. *''Notice'' and ''Effects Bargaining'' Issues*

1. Introduction; controlling principles

The facts of this case illustrate rather vividly what the Supreme Court was talking about 30 years ago in *Wiley*,[56] where it observed that:

> Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations.[57]

Here, obviously, the Union took no ''part'' in the sale negotiations; indeed, the Respondent (meaning, practically, CVG) intentionally kept the Union and the employees in the dark about the impending sale until late July,[58] and thereafter refused the Union's demands for effects bargaining and for additional information relating to the sale. Moreover, it is clear what were the ''main considerations'' influencing the behavior in the negotiations of Equitable, CVG's majority owner, and Security Pacific, CVG's lender and senior lienholder—they were set on salvaging what they could from investments that apparently had looked much better to them in 1988, when they financed the LBO, than they did by July 1993, when their investment asset was headed for bankruptcy. Finally, as to the ''inevitab[ility]'' that the ''well-being of employees'' will be merely ''incidental'' to such main considerations, there is not the slightest evidence that any of these financial institutions (nor the Respondent and CVG, who allowed Equitable to make whatever deal it could with Steinhart) considered even for a moment the Union's or the Respondent's employees' rights and interests in such a transaction (except in the inverted sense that CVG—meaning Equitable—agreed that the Union's and the employees' rights and claims under ''the Union contract'' and under CVG benefit plans would be deemed to be ''liabilities'' not assumed by ATS).

The legal issues in this case likewise are anticipated by the Court's recognition in *Wiley* that

> [T]he objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their business and even eliminate themselves as employers be balanced by some protection to employ-

[56] *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964).

[57] 376 U.S. at 549.

[58] Here, I refer to the nearly identical letters from Donlon and Walston distributed to employees on July 30, announcing the ''agreement in principle'' regarding the sale, and encouraging the employees to apply for work with ATS. Moreover, it is clear that these letters were not intended as ''notice'' to the Union, but traced instead from Walston's apparent judgment by that date that the parties' interest in maintaining the secrecy of the pending deal had to be subordinated to ATS' own, posttakeover interests in having an experienced cadre of employees to staff the new operation.

> ees from a sudden change in the employment relationship.[59]

Similar recognitions animate the settled principle that when an employer decides to sell its business, it owes a duty to so notify the union representing its employees and give the union a meaningful opportunity to bargain with the employer over the effects on those employees of the decision to sell. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981); *Metropolitan Teletronics*, 279 NLRB 957, 959 fn. 14 (1986), enfd. mem. 819 F.2d 1130 (2d Cir. 1987). The rationale for thus striking the ''balance'' in a sale-of-business context is succinctly stated in *NLRB v. Kirkwood Fabricators*, 862 F.2d 1303, 1306 (8th Cir. 1988):

> While requiring reasonable notice and effects bargaining may make a sale of a business more difficult, the ''ravages of economic dislocation'' on employees and their families terminated with no opportunities to plan their [future] . . . maintains the balance in favor of upholding the Board's determination.

One of the more difficult questions that survived these precedents, however, was how to reconcile the union's interest in the earliest possible notice and bargaining opportunity with the employer's legitimate business interest in some cases in keeping under wraps the existence of negotiations for a sale of the business until the sale agreement is reached. In at least one case, the Board had suggested that the employer owed a duty of notice and opportunity for effects bargaining as soon as an ''imminent'' transfer of the business was under ''active consideration.''[60] In its 1990 decision in *Willamette Tug & Barge Co.*,[61] however, the Board revisited these questions, and among other things, it rejected as ''unworkable'' any ''general rule'' requiring an employer to give notice and provide an effects bargaining opportunity when the sale was ''under active consideration,'' or at any other time before the ''decision to sell'' is reached—meaning, more specifically, when the seller and buyer have ''execut[ed] . . . a binding agreement to sell.''[62] Nevertheless, under circumstances that I judge are materially identical to those in this case,[63] the *Willamette* Board found that the employer acted ''in derogation of its obligation to notify and bargain in advance,'' and ordered a *Transmarine* remedy.[64]

It is worth reviewing how the Board arrived at that result, and I thus quote at length from the Board's decision:

> Although we agree with the Respondent that the decision to sell did not occur until the execution of a binding agreement to sell, we find a violation in the Respondent's failure to provide any meaningful *prior* notice to the Union that it was ceasing business and terminating employees. If a seller and a purchaser can be expected to negotiate about, and draft their agreement to provide for satisfaction of, various contingencies such as governmental clearances, *so, too, should they be able to account for the human factor—the employees' interest in having their designated representative notified and given an adequate opportunity to bargain about the effects of the sale*. That circumstances may compel confidentiality in arriving at a sales agreement *does not obviate the employer's duty to give pre-implementation notice* to the union to allow time for effects bargaining, *provision for which may be negotiated in the sales agreement*. We do not presume here to advise corporate negotiators how to accommodate the right of a union to negotiate the effect of the sale on the employees it represents. We merely decide that, *barring particularly unusual or emergency circumstances*, the union's right to discuss with the employer how the impact of the sale on the employees can be ameliorated *must be reckoned with* (as must compliance with other governmental requirements) sufficiently *before its actual implementation* so that the union is *not* confronted at the bargaining table with *a sale that is a fait accompli*. Thus, the Union here was entitled to as much notice of the closing and termination of employees as was needed for meaningful bargaining at a meaningful time. [Citing *First National Maintenance Corp. v. NLRB*, supra, and *Metropolitan Teletronics*, supra.] We need not decide exactly how many days' notice would be required for such a meaningful opportunity; we find the Respondent's same day notice clearly insufficient.[65]

In *Willamette*, the Board did not try to spell out what might constitute ''particularly unusual or emergency circumstances.'' However, the Board suggested one possibility when it referred to its decision in *National Terminal Bakery Corp.*, 190 NLRB 465 (1971). As the *Willamette* Board noted, the *National Terminal* Board had found that the employer violated notice and bargaining duties when it shut down its business, but nevertheless ''declined to include a backpay provision in the remedy because '[the employer's] decision to close its plant and the effectuation of that decision occurred almost simultaneously and resulted from pressing economic necessity.'''[66] However, as the Board stressed in not excusing the employer's behavior in *Willamette*, ''the Respondent here, in contrast, has failed to establish a similar necessity but only that it desired to maximize the sale price of the assets involved.''[67]

2. Application to the facts

In this case, obviously, the Respondent gave no ''pre-implementation notice to the [U]nion to allow time for effects bargaining.''[68] Neither did the parties in charge of the Re-

[59] Ibid.

[60] *Walter Pape, Inc.*, 205 NLRB 719, 720 (1973).

[61] *Willamette Tug & Barge Co.*, 300 NLRB 282 (1990).

[62] Ibid.

[63] *Willamette*, like this case, involved ''secret'' negotiations for the sale of a union-represented employing entity, followed by an immediate transfer of the employing operation as soon as the seller and buyer had agreed on all the details of the deal and had signed off on it, resulting in no effective notice to the union nor opportunity to bargain about the effects of the sale and transfer until after they were faits accomplis.

[64] Id. at 282–283.

[65] Ibid; emphasis added.

[66] 300 NLRB at 283 fn. 5, quoting *National Terminal*, supra at 465 fn. 1.

[67] 300 NLRB at 283 fn. 5.

[68] On brief (p. 14), the Respondent asserts that it ''satisfied its obligations under Section 8(a)(5) of the Act when it provided, and the Union actually received, notice of the sale to ATS nearly a week prior to its implementation.'' (See also id. 17–18.) The Respondent

spondent's future try during the negotiations to ''accommodate'' the Union's and the employees' statutory interests with their own professed interest in keeping the sale negotiations a secret from the world, such as by negotiating a ''provision . . . in the[ir] sales agreement'' that would have allowed preimplementation notice and bargaining.[69] Clearly, therefore, the Respondent's behavior did not conform to its preimplementation duties to the Union, as defined by *Willamette*, and just as clearly, the Respondent may escape liability for a refusal-to-bargain violation under Section 8(a)(5) only if it can be found that ''particularly unusual or emergency circumstances'' excused it from those duties.

The Respondent's ultimate defense is that the ''exigencies'' of the situation presented the kinds of circumstances envisioned by *Willamette* as perhaps excusing an employer from its preimplementation notice and bargaining duties. More specifically, the Respondent invokes ''pressing economic necessity'' in a variety of arguments that commonly stress that CVG faced imminent financial collapse. I acknowledge that the record contains undisputed evidence that CVG had been living at the sufferance of Security Pacific for many months before the sale, and that after Security Pacific's ultimatums in early July, it faced a certain business shutdown by the end of July, absent the intervention of a ''white knight.'' Nevertheless, as I discuss below, a central problem with the Respondent's invoking of CVG's ''pressing economic necessity'' as a blanket defense to the Respondent's duties as defined in *Willamette* is that it does not follow from *Willamette* that CVG 's financial status is the key to determining whether the Respondent may be excused from its preimplementation notice and bargaining duties. Rather, as I see it, the real question in the light of *Willamette*'s teachings is whether CVG's financial straits somehow made it impossible for the selling party to structure the sale so as to allow the Respondent to discharge its notice and bargaining duties to the Union. And it is when I review the record and the Respondent's arguments on brief with this latter question in mind that I can find nothing persuasively suggesting that such a structuring would have been impracticable, much less impossible.

First, nothing in the Respondent's presentation suggests that this particular question of ''structuring'' was even brought up during the sale negotiations. And although the Respondent's attorneys on brief have advanced their own suggestions as to why such a structuring could not have worked, their suggestions again assume that such structuring was entirely precluded because CVG had no further operating funds to carry the business through a ''delayed implementation'' of the sale.[70] Again, I think the main flaw in this latter argument is the arbitrariness of its central assumption—that CVG's insolvency operated as a practical bar to any delayed implementation structure.

As I construe the record, there was nothing—apart from considerations of direct or indirect impact on the ''sale price'' to Equitable—that would have prevented Equitable (and/or Security Pacific, and/or ATS/Steinhart) from providing needed funds to maintain the Respondent's operation through a period of preimplementation notice and effects bargaining with the Union.[71] (These financial institutions were not themselves shown to have been undergoing any financial emergency of their own that would have precluded one or more of them from advancing such funds; all they mutually lacked, apparently, was any interest in even talking about structuring their deal in such a way.)[72] And on this record,

---

appears to be referring to the fact that the Union became aware on or shortly after July 30 that the Respondent's employees had received letters from Donlon and Walston announcing an ''agreement in principle'' to sell CVG in a deal that was ''expected to close the week of August 2.'' Contrary to the Respondent, I find that this ''actual notice'' (such as it was) served merely to tantalize, but was wholly meaningless in legal effect. For at the same time these letters were being distributed to employees, and for the balance of the week before the sale, the Respondent was stonewalling the Union's persistent attempts to discover the details and to bargain about the effects of the impending sale on the unit employees.

[69] *Willamette* teaches that parties to the sale ''can be expected'' to ''draft their agreement to provide for satisfaction of . . . contingencies such as necessary governmental clearances.'' In this case, we need not resort to speculation about what parties can be ''expected'' to do when it comes to such ''contingencies'' as ''governmental clearances.'' For Security Pacific's June 16 letter to Walston/Steinhart had acknowledged that one of Steinhart's conditions to proceeding with the acquisition was the ''[r]eceipt of all required regulatory approvals, including without limitation, those required from the FTC and the FCC[,]'' and I infer that Steinhart would not have waived or abandoned its insistence on such ''required . . . approvals'' as part of the final deal. (Indeed, if the FTC and FCC approvals were ''required'' in the case of such an acquisition, Steinhart was without power to waive or abandon such conditions.) Moreover, given Walston's testimonial insistence that it was not clear until the final negotiations on August 4 that a deal *could* be reached, I judge it inconceivable as a practical matter that Steinhart or ATS had actually ''received'' by August 4 (or by August 5, or by any other nearby point thereafter) *any* of the ''required regulatory approvals, including . . . from the FTC and the FCC.'' In short, I infer not only that such ''regulatory approvals'' were a necessary ''condition'' of the final deal, but also that they were granted, if at all, only well after the August 5 implementation of the other particulars of the deal. Thus, to this extent, at least, there were ''delayed implementation'' features to the deal.

[70] At p. 22 of their brief, the Respondent's attorneys argue that ''delayed implementation'' of the sale could not have worked because, by the end of July, the Respondent had ''no money for a payroll, only [for a] bankruptcy [filing].'' Therefore, they argue, ''CVSI [the Respondent] could not delay implementation of the sale in order to satisfy . . . notice obligations under Section 8(a)(5).'' As I have noted in my last footnote, however, there was at least one ''delayed implementation'' feature of the August 4 deal—the receipt of necessary clearances and approvals from the FTC and the FCC— and somehow, CVG's insolvency did not present an obstacle to those delayed implementation features.

[71] Like the *Willamette* Board, I ''do not presume here to advise corporate negotiators how to accommodate the right of a union to negotiate the effect of the sale on the employees it represents.'' Rather, I merely point out in this paragraph one of perhaps many available structures or devices by which the Respondent's sellers might have accommodated the Union's legitimate interest in preimplementation notice and effects bargaining.

[72] As I have noted, supra, in its June 16 letter, Security Pacific had assured Steinhart that CVG would receive funding necessary to continue in operation through the ''closing'' of the sale then in contemplation, and to defer interest payments on its existing term loan to CVG to as late as ''July 15.'' And even though Security Pacific had announced in early July that it would cut off further funding to CVG as of July 30, and CVG itself had no funds on hand to operate after that date, someone other than CVG came up with enough money to see CVG through until August 5. Clearly, therefore, it was not inherently impracticable for the parties to have come up with a

Continued

it appears that if any of the parties to the sale had been willing to provide in some way or other for such additional operating funding to CVG during a period of ''delayed implementation,'' the only part of their deal that might have been expected to change, perhaps, is that the net ''price'' Equitable was to receive under the deal that was actually made might have to be reduced or otherwise ''diluted'' by the amounts necessary to maintain the Respondent for the notice and bargaining period. In short, the seller might not have gotten as much out of the deal as it was able to get by ignoring the employees' and the Union's rights and interests. (Of course, where there is no evidence that the New York negotiators even considered such a possible structuring, we can never be certain about what such negotiations might have yielded; but neither would I presume on this record, as the Respondent would have me do, that such a proposed structuring would have been a ''deal-breaker.'')[73]

Thus, here, as in *Willamette*, we seem to be presented in the end not with any ''pressing economic necessity'' on the part of the beneficial owners of CVG's equity and assets that might have made it impossible for the deal to be structured to permit Respondent to have given the Union preimplementation notice and opportunity to bargain, but only with a ''desire'' on the part of those owners to ''maximize the sale price of the assets involved.'' And clearly under *Willamette*, this is no defense.

I therefore conclude as a matter of law that when the Respondent failed to give the Union preimplementation notice and an opportunity to conduct meaningful preimplementation bargaining over the effects of the sale on its bargaining unit employees, the Respondent committed unfair labor practices within the meaning of Section 8(a)(5) and derivatively, Section 8(a)(1). In reaching this conclusion, however, I do not adopt the General Counsel's contention that in the particular circumstances of this case, the Respondent owed and violated a duty to give the Union ''notice'' of the ''decision'' to sell its assets and an opportunity to conduct effects bargaining thereon, *as early as* ''July 22.'' Indeed, I feel constrained by *Willamette* to reject any claim that supposes that the Respondent's duty to give the Union notice and an opportunity to bargain arose on July 22, or on any other date before the parties reached a binding buy-sell agreement.[74] Rather, consistent with *Willamette*, I will conclude simply that the Respondent's failure to give any preimplementation notice or meaningful opportunity to bargain violated Section 8(a)(5).[75]

B. *Information Disclosure Issues*

1. Applicable principles

In *Howard University*, 290 NLRB 1006 (1988), the Board summarized the principles and authorities bearing generally on an employer's duty under Section 8(a)(5) to disclose information to a union, as follows:

> it is well established that an employer has an obligation to provide a union with information relevant to its duty as a representative of the employees. *Washington Gas Light Co*., 273 NLRB 116 (1984). This obligation extends to information required by the union to process a grievance. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967); *Designcraft Jewel Industries*, 254 NLRB 791 (1981). The standard for the relevancy of the information sought by the union is set forth in *W-L Moulding Co*., 272 NLRB 1239 (1984), in which the Board, citing *NLRB v. Rockwell-Standard Corp*., 410 F.2d 953, 957 (6th Cir. 1969), stated, ''The Board's only function in such a situation is in 'acting upon the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'''[76]
>
> . . . .
>
> Relevancy, however, is not the sole factor in deciding whether the information must be produced by the [employer]. Although the requested information may be relevant, an employer may not be required to produce it if such production violates confidentiality and privilege. The [employer's] claim of confidentiality must be balanced against the Union's need for relevant information in pursuit of its role as a representative of the employ-

---

similar device to see the Respondent through a period of preimplementation notice and bargaining.

[73] I am not aware of any post-*Willamette* case involving the sale of a business in which the Board has found ''particularly unusual or emergency circumstances'' that justified the employer's failure to give a union preimplementation notice and an opportunity for effects bargaining over the sale. For this reason, even if the Respondent had been able to demonstrate that the seller's insistence on structuring of the deal to allow for ''delayed implementation'' would have been a ''deal breaker,'' I cannot be certain that this would have excused the Respondent from its preimplementation notice and bargaining obligations. I emphasize, however, that this precise question is not presented here, because there is nothing in this record showing that the idea of delayed implementation to accommodate the employees' and the Union's rights and interests was even discussed by the parties who made the deal.

[74] As I have previously noted, the complaint alleges that, ''[s]ince . . . July 22, 1993,'' the Respondent has unlawfully ''failed to give the Union timely notice of its decision to sell or transfer its assets, and has failed and refused to bargain with the Union about the effects of its sale or transfer of assets on the Unit employees.'' From her opening statement at trial, amplified on brief, it appears that General Counsel has fixed on ''July 22'' as the triggering date for these purposes because July 22 was the day CVG's agents, acting on behalf of ATS, placed orders for help wanted ads in the *Hollywood Reporter* and *Daily Variety*. And the General Counsel, joined by the Union, further argues, on brief that with the ''secrecy'' of the deal thus compromised on and after July 22, the Respondent no longer had any legitimate interest in keeping the impending deal a secret from the Union. However valid these latter points might be, the most obvious problem with the prosecuting parties' basic claim in this regard is that it assumes the existence of a ''decision'' that triggered a notice and bargaining duty on a date—July 22— that clearly preceded the selling and buying parties' concluding of a binding buy-sell *agreement*. And to this extent, the claim ignores *Willamette*'s teaching that ''the *decision* to sell [does] not occur until the execution of a binding agreement to sell,'' and its related holding that it is ''unworkable'' to impose a notice and bargaining duty at some pre-''binding agreement'' point, such as the point at which a sale decision may be ''under active consideration.''

[75] See also *Los Angeles Soap Co*., 300 NLRB 289 fn. 1 (1990).

[76] In addition, on the general subject of ''relevancy,'' I note that the ''relevance'' of any particular information sought is to be judged according to a liberal, ''discovery-type'' standard. *Acme Industrial*, supra at 437. See also *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956).

> ees. *Detroit Edison v. NLRB*, 440 U.S. 301 (1979). . . . The party asserting confidentiality has the burden of proof. *McDonnell Douglas Corp*., 224 NLRB 881 (1976).

In the light of these teachings, and considering the focus of the complaint counts relating to the Respondent's refusal to satisfy the Union's July 29 demand for information, we are presented, finally, with two questions: (1) Were ''the name and telephone number of the acquiring entity, including all officers,'' and ''[a]ll contracts relating to the acquisition''[77] items of information that were relevant to the Union's effective performance of its representative function?; and (2) Even if such information was relevant to the Union's representative needs, was the Union's interest in such information outweighed by substantial claims of confidentiality or privilege?

Pertinent to issue of the relevancy of the requested information—and especially the Union's demand for ''all contracts relating to the acquisition''—are the discussion and authorities cited in *Daniel J. Burk Enterprises*, 313 NLRB 1263, 1269 (1994). There, Administrative Law Judge George Christensen, affirmed by the Board, summarized the state of the law as follows:

> In a number of . . . cases, the Board and reviewing courts have held an employer who has sold its assets or business to another employer violates the Act by failing or refusing to provide the union representing its employees with a copy of the contract of sale between the employer and the asset purchaser . . . [which] decisions were grounded on the premise [that such] requested information would enable the union to determine if the employer and the purchaser were a single employer . . . or the alter ego or the successor of the employer, to aid the union in deciding whether to file an appropriate action against the employer.[78]

Other authorities not listed by Judge Christensen similarly stress that a Union has a legitimate interest, as an aspect of its right to bargain over the effects of a sale, in getting information about the sale of a business.[79] Thus, in *Westwood Import Co*., 251 NLRB 1213 (1980), the Board affirmed Judge Jerrold H. Shapiro's reasoning and holding, as follows:

> One obvious way of seeking to protect the interests of the employees it represented was for the Union to find out whether the new owner was a new and distinct business entity, and, if so, whether it was a successor employer obligated to recognize and bargain with the Union. In other words, the Union needed the requested information to determine whether, after the change of ownership, the [new] employer was still obligated to recognize and bargain with the Union as the representative of the employees in the certified unit. Under the foregoing circumstances, and since the sale of the business vitally affected the employees' terms and conditions of employment, I am persuaded that information concerning the sale was relevant to the Union's duty to intelligently represent the employees.[80]

2. Application to the facts

I find that the Union legitimately needed to know ''the name and telephone number of the acquiring entity, including all officers,'' and to examine ''[a]ll contracts relating to the acquisition.'' I so find for essentially the same reasons noted in the foregoing authorities—to help the Union determine, at the threshold, whether or not the ''sale'' involved the substitution of a mere alter ego of the Respondent, and/or to help determine whether or not the sale would involve someone who owed a successor's duty to recognize and bargain with the Union. Indeed, the Union invoked these very reasons—and others of seemingly equal validity, relating to pending grievances and a ''WARN Act lawsuit''—in its persistent correspondence with the Respondent's attorneys, after the Respondent had ignored the Union's initial demand for such information on July 29.[81] And despite the Union's persistent and plausible explanations for needing such information, the Respondent's last—and apparently only—specific reply to

[77] I note that the Union's July 29 information demand included ''all contracts, requests for proposals, and correspondence relating to the acquisition,'' but the complaint refers in this regard only to ''[a]ll contracts relating to the acquisition.'' Moreover, to the extent counsel for the General Counsel has been specific in her brief about what the Union has a right to see, she has focused on the ''sales agreement'' or the ''sales contract.'' (Id. at pp. 9–10.) (The Union's brief is likewise focused. Id. at pp. 21–22.) I thus construe it to be the General Counsel's position that the Union's statutory entitlement to transaction documentation is limited to ''contract'' documents, but does not include preliminary ''proposals'' or ''correspondence . . . relating to the acquisition.''

[78] 313 NLRB at 1269, citing authorities at fn. 16, as follows: *St. Mary's Foundry*, 284 NLRB 221 (1987), enfd. 860 F.2d 679 (6th Cir. 1988); *Barnard Engineering Co*., 282 NLRB 617 (1987); *Knappton Maritime Corp*., 292 NLRB 236 (1988); *NLRB v. New England Newspapers*, 856 F.2d 409 (1st Cir. 1988); *Mary Thompson Hospital v. NLRB*, 943 F.2d 741 (7th Cir. 1991); and *Chun Cha Fu, Inc*., 305 NLRB 143 (1991).

[79] E.g., *Live Oak Skilled Care & Manor*, 300 NLRB 1040, 1049, and authorities cited at fn. 20 (1990).

[80] 251 NLRB at 1226–1227.

[81] Thus, the Union's attorney, Gottlieb, wrote to the Respondent's attorney, Kopenhefer, on August 17 (G.C. Exh. 3(h)), reiterating the Union's July 29 demand for information, noting that the Respondent was ''hiding the ball,'' and that such information would bear on the claim being maintained by the Union that ATS was a ''successor.'' And on August 25, again reiterating the Union's information demand to another attorney in Kopenhefer's office, Richard Zuniga, (G.C. Exh. 3(k)), Gottlieb again reiterated the Union's request for the ''sales agreement,'' noting that the Union had filed ''multiple claims'' against the Respondent and/or ATS (including by then a grievance asserting rights under the Art. 35 ''binding on successors and assigns'' clause, and other grievances for ''severance pay,'' and a lawsuit under the Federal ''WARN Act''), and arguing, in substance, that the ''sales agreement'' was relevant to all those pending claims. And in Gottlieb's August 27 letter to Kopenhefer (G.C. Exh. 3(m)), Gottlieb cited the Union's suspicions that an ''alter ego relationship'' may exist between CVG and ATS, and again cited the pendency of other ''substantial monetary claims against [the Respondent]'' as reasons which ''clear[ly]'' made it ''relevant to [the Union's] representational rights and obligations'' to be able to review the ''content of the sales agreement.'' (Indeed, in that letter, Gottlieb cited many of the same legal authorities I have cited, supra, as containing ''applicable principles.'') See also R. Exh. 8, items 3–5 (Union's September 2 reiteration of demand for ''all documents related to the assets sale,'' again citing reasons), to which the Respondent has apparently never replied.

these demands was notable for a certain legal obtuseness. Thus, on September 1, Richard Kopenhefer, writing as the Respondent's attorney, told the Union's attorney, Ira Gottlieb, as follows: (R. Exh. 7, p. 2, item 4):

> Regarding your demand for production of sale documents, we still see no coherent legal basis for your request. Since we had no duty to bargain concerning our decision to sell the company's assets, we fail to see how we have any statutory duty to provide sales documents.

As the authorities cited in the previous section make clear, it is quite irrelevant to the question of a union's rights to information about a sale of the employing enterprise that the seller is not legally required to bargain about its ''decision'' to sell the business. For the employer-seller still must bargain about the effects of such a decision on unit employees, and as an incident thereto, it must normally give the union access, upon request, to the sale agreement and more generally, to ''information concerning the sale.'' And Attorney Kopenhefer may be presumed to have been aware of these legal realities, not least because, in a letter to Kopenhefer dated August 27, Gottlieb had cited many of the same authorities I have previously referred to. Accordingly, it is reasonably clear that the Respondent's refusal to furnish the sale agreement was not genuinely grounded in the reason advanced by Kopenhefer on September 1 for refusing to ''provide sales documents.'' Neither, obviously, would such a reason make out a defense to its refusal to produce such documents.

Significantly, moreover, the Respondent on brief has made no claim whatsoever that furnishing the Union with the information at issue would ''violate confidentiality and privilege.''[82] In the absence of any such claim, and in the light of the Respondent's failure to make a record on which such a claim might be judged,[83] I do not propose, sua sponte, to assess any such potential claims, but will treat them as having been waived or abandoned. Finally, I am not persuaded by the arguments that the Respondent *has* chosen on brief to advance in defense of its refusal to disclose the information at issue. Thus, the main defense to production invoked by the Respondent is pinned to the (unexceptionable) claim that the Respondent ''could not furnish the Union with 'contracts relating to the acquisition' *prior to the sale* . . . for a very obvious reason. The sales contract with ATS was not executed until August 3rd or 4th.''[84] As I acknowledge below, the Respondent's point is valid, but only insofar as the complaint alleges that the Respondent owed a duty *as early as ''July 29''* to furnish the Union with the ''contracts relating to the acquisition.'' And clearly, this argument can serve as no defense to such production after the binding agreement to sell was executed.[85]

Accordingly, I conclude as a matter of law that the Respondent's refusal to disclose to the Union the information items identified in the complaint—''the name and telephone number of the acquiring entity, including all officers,'' and ''[a]ll contracts relating to the acquisition''—violated Section 8(a)(5) and derivatively, Section 8(a)(1). Contrary to the complaint, however, which alleges that the Respondent's duty to disclose all such information arose as early as ''July 29,'' I find that the information thus described could not exist until the August 3 or 4 date when the sale agreement was executed. And therefore, I treat the Respondent's violation in this respect as having begun on whichever of those two dates the execution of the agreement actually took place.

THE REMEDY

On the strength of the Board's same-day decisions in *Willamette*, supra, *Los Angeles Soap*, supra, and *Live Oak Convalescent Center*, supra, I find that a ''*Transmarine* backpay'' order is required to remedy the Respondent's unlawful failure and refusal to give the Union preimplementation notice of the sale, and a meaningful opportunity to bargain, before the sale was fait accompli, about the effects of the sale on the employees it represented. Moreover, to remedy the Respondent's unlawful withholding of the information in question, and to ensure that any effects-bargaining con-

[82] It is true that, on December 9–10, in arguing in support of its petition to revoke the *General Counsel's* subpoenas seeking production *for the General Counsel's inspection* of the documents comprising the sale agreement, the Respondent's counsel asserted confidentiality and privilege arguments. (The only items identified by the Respondent's counsel in this respect were (1) a schedule incorporated into the sale agreement listing CVG's ''creditors'' and the amounts owed, and (2) salaries of nonbargaining unit employees of ATS. Despite my several invitations to counsel to identify a legal ''privilege'' that would insulate either of those categories of ''transaction documents'' from disclosure, however, counsel did not do so. And he made only the vaguest argument that these categories of documents fell within a recognized zone of privacy or ''confidentiality.'') Moreover, as the record shows, in substantially denying the petition to revoke I found a ''liberal, discovery standard''-basis for the ''relevancy'' of the sale transaction documents to the issues raised by the complaint and the Respondent's defenses thereto. And in granting the petition to revoke so as to shield from *the General Counsel's inspection* only those documents containing salary information of nonbargaining unit employees of ATS, I noted simply that the General Counsel had failed to persuade me that such information was relevant to the issues in the case, even under the ''liberal, discovery standard'' under which subpoena disclosure disputes are to be analyzed. And having so ruled, I did not reach the question whether any of the salary information was shieldable as ''confidential.'' Neither, in ruling on the subpoena question, did I purport to decide the quite separate question of the Union's statutory right to have viewed the entire sale agreement, including the ''ATS nonunit salary'' documents.

[83] As the Board noted in *Howard University*, supra, ''The party asserting confidentiality has the burden of proof. *McDonnell Douglas Corp*., 224 NLRB 881 (1976).''

[84] R. Br. 34; emphasis added.

[85] On this latter point, the Respondent's only argument (Br. 34) is that on November 24, during the severance pay arbitration, the Respondent ''provided the Union with those portions of [the] huge and complex [sale agreement] document which were germane to the issues in that case.'' This disclosure, however, was both too late and too little. It came 4 months after the Union's initial demand, and not in response to that demand, but rather, under order of an arbitrator; and by the Respondent's admission, it gave the Union only so much information about the sale agreement as the arbitrator ruled, after *in camera* examination, was ''germane'' to the severance-pay grievance. Clearly, therefore, this limited disclosure did not respond to the Union's legitimate interest in seeing the entire agreement, insofar as it might illuminate such questions as the possible status of ATS as an alter ego or disguised continuance of CVG, or the possible status of ATS as a successor to the Respondent's labor relationship with the Union.

templated by the *Transmarine* order is meaningful, my Order requires the Respondent immediately to furnish the Union with the information in question, without need for further request by the Union, and the backpay feature of my Order contemplates that the ''backpay period'' will in no event terminate before the Respondent furnishes the information in question to the Union, or the Union waives its right to such information. Also, in addition to the customary notice posting requirement at the Respondent's own offices or facilities (which may be pointless if the Respondent no longer has employees or operations), my Order directs that, unless ATS/Four Media is itself willing to post the Respondent's notices in the facilities and operations it took over from the Respondent (where many, if not most of the Respondent's former employees are now working), the Respondent shall mail copies of the notices to its former employees at their last known mailing addresses.

I have considered the Respondent's arguments in its brief for withholding a *Transmarine* remedy, but I remain unpersuaded by any of them. Thus, to the extent that the Respondent relies on ''financial emergency,'' I find its arguments no more persuasive in this context than I did when the same considerations were invoked as defenses to the Respondent's violations of Section 8(a)(5).[86] And I find especially unconvincing the Respondent's attempts to distinguish this case for remedial purposes from *Live Oak* (or from *Willamette*).[87] Finally, the Board's recent decision in *Dallas Times Herald*, 315 NLRB 700 (1994), would appear to dispose of points the Respondent raised only indistinctly during the trial concerning the impact of the WARN Act on the appropriateness of a *Transmarine* remedy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[88]

ORDER

The Respondent, Compact Video Services, Inc., Burbank, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to give timely notice and to bargain with International Alliance of Theatrical Stage Employees (IATSE) as the exclusive representative of its employees in the unit covered by its most recent collective-bargaining agreement with IATSE, with respect to the effects on its unit employees of the decision to sell or otherwise transfer its assets and operations covered by the agreement.

(b) Failing or refusing to furnish IATSE with the information found here to have been relevant and necessary to IATSE's performance of its function as the representative of unit employees, to wit: The name and telephone number of the entity that acquired the assets and took over the operations of the Respondent and its parent, Compact Video Group, Inc. , and all contracts relating to the acquisition.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately and without precondition furnish to IATSE the name and telephone number of the entity or entities that acquired the assets and/or took over the operations of the Respondent and its parent, Compact Video Group, Inc., together with all contracts relating to the acquisition and takeover.

(b) On request, bargain collectively in good faith with IATSE concerning the effects on its employees in the IATSE-represented unit of the decision to sell or otherwise transfer its assets and operations and to terminate the employees.

(c) Subject to the following specifications and limitations, pay backpay and interest to the IATSE-represented employees terminated on or about August 5, 1993, as part of the acquisition and takeover. Backpay shall be paid at the rate earned by the unit employees on their last date of employment with the Respondent; interest is to be computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The backpay period shall commence on the 6th day after this decision and order is entered and shall continue to run until the earliest of the following conditions occurs: (1) The Respondent reaches agreement with IATSE concerning the effects of the sale on the unit employees; (2) the Respondent and IATSE reach a bona fide impasse in such bargaining unrelated to any failure on the Respondent's part to have furnished the information it is separately directed herein to furnish to IATSE; (3) IATSE, within 5 days after having been furnished with the information in question, or having

[86] I note, moreover, that the Respondent made no showing that might support a claim of post sale ''inability to pay'' on the Respondent's part.

[87] Particularly unimpressive was the Respondent's suggestion (Br. at p. 30) that this case may be distinguished from *Willamette* and *Live Oak* on the ground that in those cases, unlike here, the employers were ''bad.'' Neither am I persuaded that it was critical to the Board's ordering of a *Transmarine* remedy in *Live Oak* that there the union had certain express contractual rights to presale notice and effects bargaining. Indeed, I find *Live Oak* far more striking for the fact that there, unlike here, it was absolutely clear that ''not a single employee suffered a penny's loss of earnings (nor a moment's loss of work) as a result of Respondent's unlawfully unilateral implementation of its decision to transfer the operation to the successor.'' (300 NLRB at 1052.) (Also, there, unlike here, the successor had immediately recognized the union when it acquired the enterprise, and had soon thereafter adopted the predecessor's labor agreement with the union. Id. at 1045–1046.) Nevertheless, in holding that ''a *Transmarine* backpay remedy is warranted in this case'' (id. at 1042), the Board appears to have relied on two factors that are likewise present in this case: (a) The union had indicated a ''keen interest in, and a quick response to, any indication that the . . . facility would be sold,'' and was otherwise diligent in seeking to gain information and to conduct effects bargaining before the transfer of the employing enterprise (id. at 1040–1041); and (b) the respondent-employer's unlawful refusals to bargain with the union made it ''not clear'' whether or not the union ''might have'' gained more for the employees, such as ''severance pay,'' if ''timely, effects bargaining'' had been conducted. (Id. at 1040–1042; see especially p. 1042 fn. 9.) And therefore, the Board found it ''reasonable to require that 'the employees whose statutory rights were invaded . . . and who *may have* suffered losses in consequence thereof, be reimbursed for such losses,'' through the device of a ''*Transmarine* backpay remedy.'' (Id. at 1042; emphasis added.)

[88] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

waived its right to such information, fails to request bargaining, or fails to commence negotiations within 5 days of the Respondent's own request to bargain; (4) IATSE fails to bargain in good faith. **But in no event** shall the backpay sum paid to any of those employees exceed the amount they would have earned as wages from the date of their terminations by the Respondent to the date they secured equivalent employment elsewhere, or the date on which the Respondent shall have furnished the information in question and offered to bargain in good faith; **provided further, however, in no event** shall the backpay sum be less than such employees would have earned for a 2-week period at the rate of their wages when last in the Respondent's employ.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Burbank, California offices and facilities copies of the attached notice marked ''Appendix.''[89] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Sign and return to the Regional Director sufficient copies of the notice for posting by ATS Acquisition Corp., Inc. and/or Four Media Company, if willing, at all places where notices to employees are customarily posted.

(g) Absent the willingness of ATS and/or Four Media to thus post notices, the Respondent shall mail signed copies of the notices to its employees on its payroll on its last day of operations, to those employees' last known addresses.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[89] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to give timely notice to and bargain with International Alliance of Theatrical Stage Employees (IATSE) as the exclusive representative of our employees in the unit covered by our most recent collective-bargaining agreement with IATSE, with respect to the effects on our unit employees of the decision to sell or otherwise transfer our assets and operations covered by said agreement.

WE WILL NOT fail or refuse to furnish IATSE with the information found by the Board to have been relevant and necessary to IATSE's performance of its function as the representative of a unit of our employees, to wit: The name and telephone number of the entity that acquired the assets and took over the our operations and those of our parent, Compact Video Group, Inc., and all contracts relating to the acquisition.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL immediately and without precondition furnish to IATSE the name and telephone number of the entity or entities that acquired the assets and/or took over our operations and those of Compact Video Group, Inc., together with all contracts relating to the acquisition and takeover.

WE WILL, on IATSE's request, bargain collectively in good faith concerning the effects on our employees in the IATSE-represented unit of the decision to sell or otherwise transfer our assets and operations and to terminate our employees.

WE WILL, subject to certain specifications and limitations in the Board's Order, pay backpay and interest to the IATSE-represented employees we terminated on or about August 5, 1993, as part of the acquisition and takeover.

COMPACT VIDEO SERVICES, INC.